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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1951

UNITED STATES OF AMERICA,
Petitioner

v.

ATLANTIC MUTUAL INSURANCE COMPANY, FARR SUGAR CORPORATION, AMERICAN SPIRITS, INC., *et al.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION BY ROSCOE H. HUPPER, ESQ., FOR ALLOWANCE OF TIME TO ARGUE AS COUNSEL ON BEHALF OF PETITIONER'S SUBROGATED LIABILITY UNDERWRITERS

PAUL D. PAGE, JR.,
of Counsel.

IN THE

Supreme Court of the United States

October Term, 1951

No. 450

UNITED STATES OF AMERICA,
Petitioner,
v.
ATLANTIC MUTUAL INSURANCE COMPANY, FARR SUGAR CORPORATION, AMERICAN SPIRITS, INC., *et al.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION BY ROSCOE H. HUPPER, ESQ., FOR ALLOWANCE OF TIME TO ARGUE AS COUNSEL ON BEHALF OF PETITIONER'S SUBROGATED LIABILITY UNDERWRITERS

ROSCOE H. HUPPER, of 27 William Street, New York City, member of the Bar of this Court since November 3, 1915, hereinafter called "Subscriber", hereby moves the Court for an allowance of time for argument by him in the foregoing Docket 450, and in aid thereof respectfully represents:

1. The controversy herein concerns a clause in a uniform bill of lading for maritime commerce commonly known as the "Both-to-Blame" collision clause. Its general purpose is to regulate the incidence of money damages sustained by owners of cargo on one ship (or both) when each of two ships is in some measure at fault for a collision between them in navigable waters. This clause is found in the currently-used bill of lading prepared in 1937 by the

Uniform Bill of Lading Committee, of which Subscriber was Chairman. The validity of the clause (which is the issue in this case) is of great commercial importance but presents no "governmental" or political problem.

2. The collision, November 24, 1942, in New York Harbor, between the steamship NATHANIEL BACON, owned by the United States, petitioner herein, and the Motor Vessel Esso BELGIUM, owned by a Belgian corporation, was of the nature above described. This was determined on the basis of facts developed in the collision litigation had in the District Court for the Southern District of New York. By authorized agreement between counsel for the respective parties R. 71-78, without requiring a formal decision by the Court, the collision feature of the litigation was so settled by interlocutory decree R. 113, 119—but with segregation and exception of the feature next below noted.

3. Excepted from and not determined in the collision branch of the litigation was the matter of the validity of the "Both-to-Blame" clause. The terms thereof are at R. 58, fol. 173. That is the focus of the presently pending branch of the litigation. The cargo on board the NATHANIEL BACON and damaged in the collision had been shipped under bills of lading containing said "Both-to-Blame" clause, which was and is in customary use. That clause purports to impose a refunding liability on the owners of the Bacon's cargo in respect of damage thereto caused by said collision.

4. This segregated bill of lading matter was tried in the District Court before Medina, D. J., who rendered his decision upholding the "Both-to-Blame" clause May 9, 1950, R. 101-113. The Court of Appeals for the Second Circuit reversed that decision August 31, 1951, with dissent by A. N. Hand, C. J., R. 135-48. The petition for *certiorari* herein was granted by this Court January 14, 1952, on the basis of general importance of the question.

5. The liability of the petitioner as carrier under the bills of lading for cargo damage, including that affected by

the "Both-to-Blame" clause, was covered by Protection and Indemnity insurance under the usual form of policy in such cases. This was arranged and administered by Fulton P & I Underwriting Agency, Inc., at New York, being Attorney and/or Agent of the several Assurers, 6 well-known American insurance companies. The total liability was apportioned between them in respective several amounts totaling 100%. The policy contained the usual provision for coöperation by the Assured with the Assurers "in the defense of any claim or suit or in the appeal from any judgment, in respect of any occurrence as hereinbefore provided."

6. The agreed coöperation has been had throughout the entire litigation involving the bill of lading. The Subscriber and his associates in the firm of Burlingham, Veeder, Clark & Hupper, 27 William Street, New York City, have collaborated with the Department of Justice and the Solicitor General of the United States in the preparation of the Petition for *Certiorari* and of the brief for petitioner filed herein. His name has, by his request, been included by the Solicitor General among the counsel thereon named. He argued the appeal before the Court of Appeals. His firm handled the bill of lading branch of the litigation before the District Court. All this was done pursuant to employment and direction by Fulton P & I Underwriting Agency, Inc., on behalf of the 6 Assurers (underwriters) aforesaid. These several steps were for protection of their interest under the aforesaid policy by which all liability in respect of the damage to cargo on the BACON rested on them except for a "deductible" of $2500. That minor sum would in any event be the limit of petitioner's liability in respect of cargo.

7. The cargo damages chargeable (except for said insurance) against petitioner in respect of the collision were $45,345.06, as determined by agreement of the parties, pending the entry of a final decree in the District Court. Of this amount, only $2500 would be borne by petitioner,

in view of being protected by the aforesaid insurance against the balance of $42,845.06. The Assurers are subrogated to all rights of petitioner under the bill of lading in respect of that sum.

8. Thus the interest of the Assurers in this controversy is some 17 times that of petitioner, whose interest they have protected and still continue to protect, from which circumstance the subrogation of Assurers is derived. Their respective interests are of exactly the same nature in legal principle, without any divergence whatsoever. They are directed jointly to the "Both-to-Blame" clause being upheld, by reversal of the August 31, 1951 decision of the Court of Appeals and affirmance of the May 9, 1950 decision of the District Court. Before the settlement mentioned in Paragraph 2 hereof was made, the underwriters confirmed to petitioner that the insurance liability as the same might develop would be duly paid to petitioner. See pages 16-18 hereof, *infra*.

9. Because of the several foregoing facts and circumstances, including particularly their overwhelming comparative interest (17 to 1) the aforesaid Assureds of petitioner, through Fulton, etc. Agency aforesaid, have represented to and requested of the Subscriber that he should argue this case before this Court on their behalf, having regard also to due protection of the interest of petitioner. That interest is exactly the same as their interest, in that reversal of the decision of the Court of Appeals would relieve petitioner of a present liability of $2,500. (by way of the "deductible"), at the same time that said Underwriters would thereby be relieved of their present liability for the $42,845.06 balance. On the other hand, affirmance would not increase or otherwise alter the present respective liabilities above indicated. The Subscriber has agreed to perform the service thus requested and has tendered his services in that regard to petitioner through the Solicitor General. See p. 7, *infra*. The argument is expected to be had on Thursday, March 6, 1952, or soon thereafter.

10. Subscriber has used his best efforts to arrange the matter of argument as thus requested by his clients but has not been able to secure the concurrence of the Solicitor General.

11. Annexed hereto on pp. 7-20 are complete and true copies of the several items of correspondence in the premises, as exchanged between Subscriber and the Solicitor General. Being reasonably brief, there is no need to set forth here any particular items thereof. Subscriber deems it in order, nevertheless, to mention his considered belief that no such matter of policy is involved in this Docket 450 as would require argument by the Solicitor General rather than by private counsel as named on petitioner's brief. This is because the interest of Subscriber's clients and that of the petitioner coincide in principle exactly and absolutely; because the subject matter is purely commercial and related only to maritime commerce, in the conduct of which under bills of lading the interests of private shipowners and carriers as well as those of their protecting Underwriters overwhelmingly predominate. The greatly preponderating financial interest of the subrogated Assurers (underwriters) here is emphasized above.

12. Subscriber believes and represents that the position taken by the Solicitor General in his letters to Subscriber dated February 11 and 26 fails to regard adequately the true realities and rights of the situation; and that it would be highly inequitable and unjust that the subrogated Assurers be excluded and prohibited from having this matter argued in their behalf by counsel of their choice. Subscriber is informed that completion of very many General Average statements, likewise determination and conclusion of many other pending suits, await the guidance that shall result from the decision of this Court. By reason of his dealings in admiralty affairs he is aware and therefore states that the shipping and commercial community throughout the United States, and also other countries, are broadly and deeply interested in said decision for the settled determina-

tion it shall make of this "Both-to-Blame" bill of lading matter. No domestic or international matters of political consequence or bearing are involved. Petitioner does not normally act as carrier in the sense that it was operating the NATHANIEL BACON in November 1942 as part of war-time activities.

WHEREFORE, Subscriber requests that, on consideration of the premises and in the interest of justice, this Honorable Court fix and allow to Subscriber as counsel for the subrogated Assurers appropriate time for argument on their behalf. Subscriber does not seek time in excess of that provided for in the Rules, but undertakes hereby to argue the entire case from the side of his clients in substantially less than said period.

The Solicitor General has been duly notified by telegram of the making of this motion (see p. 20, *infra*). Copies of these motion papers are being submitted to his office, likewise to other counsel of record, in advance of their being presented to this Court.

All of which is respectfully submitted,

ROSCOE H. HUPPER
Subscriber

New York, N. Y. February 29, 1952.

PAUL D. PAGE, JR.,
of Counsel

Letterhead of

BURLINGHAM, VEEDER, CLARK & HUPPER
27 William Street
New York 5

February 7, 1952

NATHANIEL BACON—
ESSO BELGIUM
Collision November 24, 1942
"Both-to-Blame"
Bill of Lading Collision Clause
Certiorari in U. S. Supreme Court

Dear Mr. Solicitor General:

Referring to the *certiorari* granted recently by the Supreme Court on your application, in which we collaborated as counsel for the involved underwriters, we understand that the argument is presently expected to take place about March 7 next.

We have also been pleased to collaborate with your office in preparation of the brief due to be served on opposing counsel and filed in the Supreme Court February 15.

We are also pleased to tender our services to argue this appeal in the Supreme Court, free of any expense to the Government. In connection with this, we suggest that the name of the writer undersigned, Roscoe H. Hupper, being a long-time member of the bar of the Court, be affixed to the brief as counsel, which course we believe would be good order in the circumstances of this matter.

Our firm handled this matter in the District Court, where the decision of Judge Medina was favorable; likewise in the Court of Appeals, where Judge Clark wrote the reversal, with Judge A. N. Hand filing a dissent.

The interest of the Government is protected under the usual form of "Protection and Indemnity" policy issued on behalf of six important insurance companies of long-standing and high responsibility. Proceedings under this policy are handled by Messrs. Fulton P. & I. Agency here, who engaged our firm to handle the matter in their interest —a collision between the two above vessels (the BACON owned by the Government) being the major matter involved; the "both-to-blame" clause in bills of lading was also involved in respect of cargo on the BACON. This clause became prominent because the collision controversy was disposed of on the basis of both ships being to blame, with owners of cargo on the BACON therefore claiming against the Esso BELGIUM.

The insurance policy protecting the BACON interest contained the usual clause requiring the assured (BACON and its owners) to coöperate with the underwriters "in the defense of any claim or suit or in the appeal from any judgment", etc. This coöperation has been complete from the beginning, and the U. S. Attorney's office here required that the underwriters, through us as their counsel, should handle the matter, inasmuch as liability rested on them in event of the clause being held invalid—except as to a usual $2500 deductible. This outline shows the mutual position as concerns the insurance, which means that the above underwriters have the sole interest in this litigation except for the $2500 deductible.

The money amount involved in this particular controversy is a total of around $45,000. There are, however, many other similar situations pending, some involving very large amounts, wherein court decisions and settlements cannot readily be made or general average statements concluded, until this particular litigation is disposed of by the Supreme Court's decision—which will surely guide further activities in respect of the "both-to-blame" clause.

The writer was Chairman of the Uniform Bill of Lading Committee, which in 1937 prepared the current form of lad-

ing, including the "both-to-blame" clause. There is a great deal of maritime law background in this pending situation, including various features of collision law and decisions, the limited liability laws and amendments from 1851, the Harter Act, the Carriage of Goods by Sea Act, the Brussels' Convention, practices of general average adjusters, provisions of various types of insurance, etc., etc. Indeed, the case involves or may develop about as many complications as one might readily imagine to show up in the course of an argument; it is naturally of much interest to the maritime commercial world not only here but likewise abroad.

In relation to this comment, we noted only today that Lloyd's List, London, in a recent issue has printed Judge Clark's opinion.

Although we do not pretend to possess powers of argument superior to those of any other counsel, nevertheless we believe that our considerable experience and rather special information on various points involved as above mentioned, among others, well justifies our arguing this particular case as above suggested.

We await your advices at convenience.

Very respectfully yours,

Roscoe H. Hupper (Sgd.)

RHH:S

Hon. Philip B. Perlman,
Solicitor General of the United States,
Department of Justice,
Washington, D. C.

[EMBLEM]

Letterhead of

OFFICE OF THE SOLICITOR GENERAL

Washington, D. C.

February 11, 1952

ROSCOE H. HUPPER, ESQUIRE,
BURLINGHAM, VEEDER, CLARK & HUPPER,
27 William Street,
New York 5, N. Y.

Re: *United States* v. *Atlantic Mutual Ins. Co., et al., No. 450, Oct. Term, 1951.*

Dear Mr. Hupper:

I have your letter of February 7, 1952, relating to the briefing and argument of the above-entitled case. You point out that your firm, as counsel for Protection and Indemnity underwriters, bore the primary responsibility for briefing and arguing the case in the courts below, and you offer your services to argue it in the Supreme Court.

This office has been glad to cooperate with your firm in the preparation of the brief for the United States, and we are grateful both for the many useful suggestions which have been made available to us, particularly by Mr. Haller of your firm, and for the cooperative spirit in which they have been made. I agree that it would be entirely appropriate and desirable for the name of yourself and any other members of your firm that you may designate to be affixed to the brief as of counsel, and we will be happy to follow your suggestion in this respect.

With respect to the argument of the case, I regret that I am unable to accept your offer. It has been the general policy of this office that in cases in which the United States is a party the United States shall be represented in the

Supreme Court by the Solicitor General, or by an attorney of the Department of Justice or another federal agency who is designated by me and presents the case subject to the supervision of this office. This policy is intended to assure the Supreme Court, so far as possible, of consistency in the presentation of the views of the United States. It has been applied in cases in Admiralty in which, as in the present case, counsel for Protection and Indemnity underwriters bore the major responsibility in the courts below. See, *e.g.*, *McMahon* v. *United States*, 342 U. S. 25; *Warren* v. *United States*, 340 U. S. 523; *Black Diamond* v. *Stewart & Sons*, 336 U. S. 386. To depart from it here might invite a feeling on the part of the Court that this office disclaimed responsibility for the position urged on behalf of the United States by private counsel.

I appreciate the spirit in which your offer is made. Needless to say, we shall be happy to receive any suggestions which you may care to offer respecting the presentation of the argument.

Sincerely yours,

Philip B. Perlman

PHILIP B. PERLMAN,
Solicitor General.

Letterhead of

BURLINGHAM, VEEDER, CLARK & HUPPER
27 William Street
New York 5

FEBRUARY 18, 1952

Re: UNITED STATES *v.*
ATLANTIC MUTUAL INS. CO., *et al.*
No. 450, Oct. Term, 1951

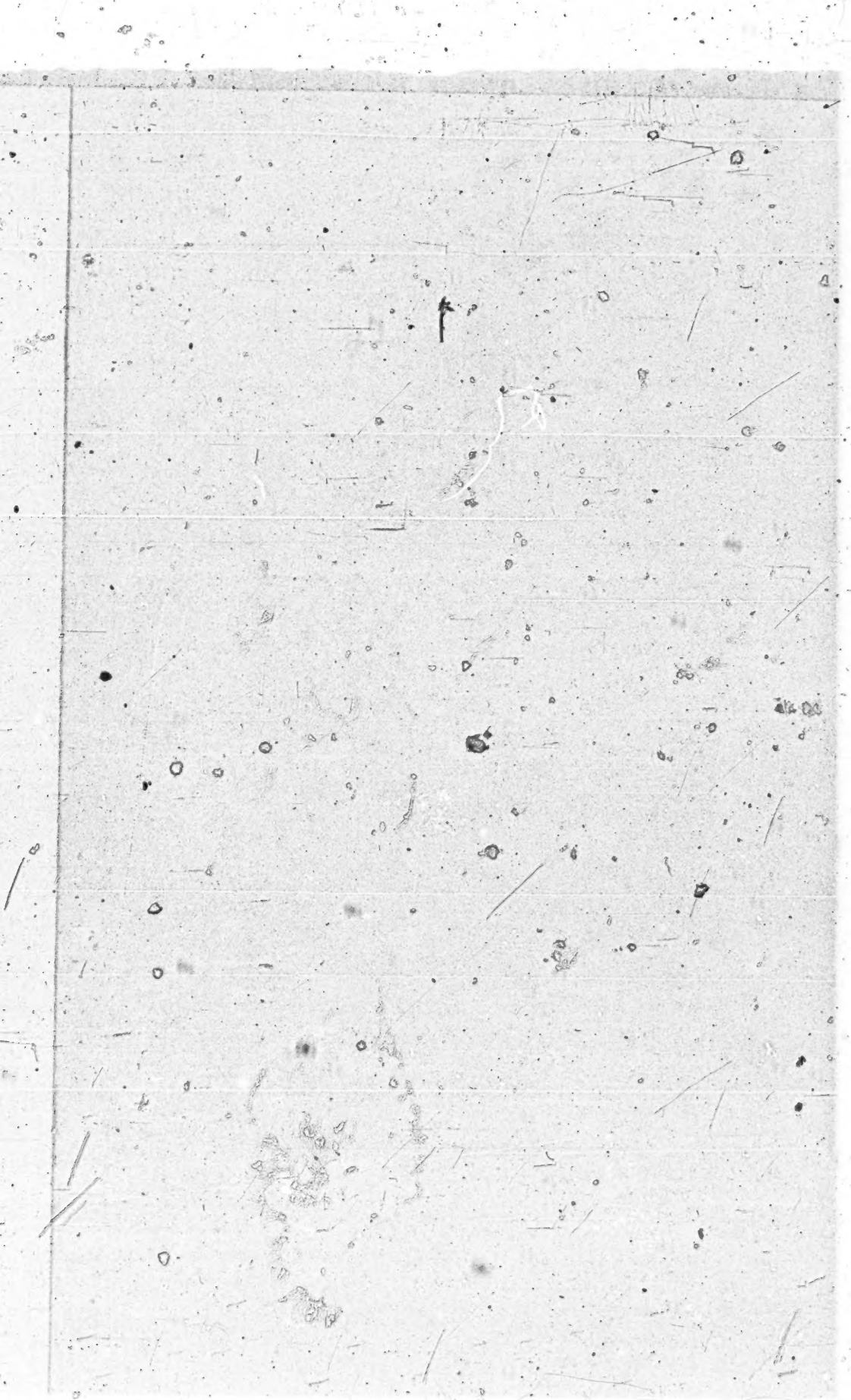
Dear Mr. Solicitor General:

Responding to your kind letter of February 11, received here the 13th, I take due note of your advices, and respectfully suggest that this subject-matter may merit reconsideration.

Referring to final sentence in your penultimate paragraph, it seems to me that no substantial risk exists of the nature there suggested. The intent is that our argument would be as counsel (so specified) for the Government, as well as for the underwriters. This is because their respective interests are in principle precisely the same and not in any wise conflicting; so that whatever helps one interest helps the other.

The financial interest of the underwriters here is about 17 times greater than that of the Government, which disproportion would seem reasonably to justify argument by counsel representing the underwriters. We do not find anything to the contrary in the *Black Diamond* case, 336 U. S. 386, where it appears that private counsel argued notwithstanding that the ship involved was owned by the Government. Neither that case, nor the *Warren* case, 340 U. S. 523, nor the *McMahon* case, 342 U. S. 25, (which three you mention), appears to have involved any feature of disparity comparable to that here presented.

Possibly the situation will be better clarified to you by reference to copy correspondence hereto annexed in letters dated March 11, 1944, November 5, 1946 and December 10,



1946, touching the subject-matter of the insurance in respect of the "both-to-blame" clause, and the undertaking by the underwriters to pay said insurance to the Government, etc., etc. Reference may be had also to the Record herein at pp. 80-82. The status of the whole matter as confirmed by these several documents has not in any wise changed.

The several considerations above mentioned, as well as those in our February 7 letter, including our tender of services in arguing the case, seem to us to conform clearly and decidedly to the coöperation provision in the policy which we mentioned in our February 7 letter.

Our clients here have indicated to us strongly their belief that they have a right to have argument made by their counsel; and that they desire that such argument should be made by us in their interest—which interest they are certain corresponds to that of the Government and in no way conflicts therewith.

The mutual coöperation and collaboration in drafting the brief is much appreciated here. Doubtless considerable additional mutual coöperative effort will be required in preparation of further brief to be filed in reply to appellees' brief when received. Appellees' counsel are known to be astute in matters of this nature, and their brief will surely invite careful study and forceful argument from our side.

We respectfully hope that you may now be able to view this matter in the same sense we have sought to indicate above. We shall appreciate very much having your further advices at such early date as may suit your convenience.

Very sincerely yours,

Roscoe H. Hupper (Sgd.)

Enclosures
RHH:S

Hon. Philip B. Perlman,
Solicitor General,
Department of Justice,
Washington, D. C.

Letterhead of

WAR SHIPPING ADMINISTRATION
45 Broadway
New York 6, New York

MARCH 11, 1944

MESSRS. BURLINGHAM, VEEDER, CLARK
AND HUPPER
27 William Street
New York 5, New York

S.S. NATHANIEL BACON—MS ESSO BELGIUM,
November 24, 1942. File 32724

Gentlemen:

We wish to confirm the writer's telephone conversation with your Mr. Wright in which we advised that Messrs. Kirlin, Campbell have indicated they are willing to recommend settlement of the suits arising out of the NATHANIEL BACON—Esso BELGIUM collision on November 24, 1942 on the following basis: The Esso BELGIUM to pay ⅔rds of all damages and the NATHANIEL BACON ⅓rd; included in the adjustment and setoffs would be cargo's claim in its full amount or 100%. This settlement would leave open for further litigation the validity of the both to blame clause in the BACON's bill of lading. Messrs. Bigham, Englar on behalf of cargo insist on payment to them of 100% of cargo's claim if the both to blame clause is to be litigated.

Insofar as the hull interests of the NATHANIEL BACON are concerned we are willing to recommend adoption of this settlement. However, inasmuch as the Fulton P & I Agency have insured cargo on the BACON, we of course must ask for their views and we hereby do so.

In either of the following events we will recommend settlement on a ⅔-⅓ basis:

1. If the Fulton P. & I. Agency authorizes, approves and agrees to the settlement outlined above without prejudice.

2. If the Fulton P. & I. Agency gives us a commitment, that in the event the collision liability is determined on a both to blame basis and in the event the both to blame clause in the bill of lading is held to be invalid, then the setoff by the Esso Belgium against the Nathaniel Bacon of cargo's claim will be for the account of the Fulton P. & I. Agency.

Settlement of the hull claims between the Esso Belgium and the Nathaniel Bacon is impossible without including cargo.

May we ask you to furnish us with advices from the Fulton P. & I. Agency with respect to the foregoing. As the trial is imminent and as there necessarily will be some delay in obtaining authority if this case is to be settled, we would greatly appreciate your giving this your early attention. We enclose an extra copy of this letter in the event you wish to forward it direct to the Fulton P. & I. Agency.

Very truly yours,

Vincent A. Catoggio, Jr. (sgd.)

Vincent A. Catoggio, Jr.
Assistant District Counsel

VAC: gf

By Hand

Letterhead of

UNITED STATES MARITIME COMMISSION

New York, N. Y. 6

45 Broadway

NOVEMBER 5, 1946.

MESSRS. BURLINGHAM, VEEDER, CLARK & HUPPER
27 William Street
New York 5, New York

S.S. NATHANIEL BACON—SS ESSO BELGIUM, *collision, November 24, 1942. Both to blame collision clause.*

Our File 32724

Gentlemen:

We have a copy of Fulton P. & I. Underwriting Agency letter of October 9, 1946. The statement, that the Agency will make reimbursement under the P. & I. policy, less the deductible of $2,500., in the event you shoud be unsuccessful in recouping on behalf of the NATHANIEL BACON any payment which the NATHANIEL BACON may be required to pay to cargo interests, is satisfactory to us. However it is to be noted that under the present state of the pleadings we are making claim directly against the owners of the cargo, not against cargo underwriters as Fulton's letter states.

We assume Fulton has full authority of its principals to enter into this binding agreement.

May we ask that for record purposes Fulton P. & I. Underwriting Agency, Inc. address a letter directly to us incorporating the agreement. After all you will appreciate

that in this matter we in this office are acting as principals and really should have a direct commitment from Fulton.

You no doubt know that we have many other cases in which the both to blame clause is involved. Accordingly we would appreciate being kept advised of developments herein.

Very truly yours,

VINCENT A. CATOGGIO (Sgd.)
Associate District Counsel.

Vincent A. Catoggio

VAC:gf

Letterhead of

FULTON P & I UNDERWRITING AGENCY, INC.

December 10th, 1946

U. S. MARITIME COMMISSION
39 Broadway
New York 6, N. Y.

Attention of Vincent A. Catoggio, Esq.,
Associate District Counsel

Re: SS NATHANIEL BACON
Esso Belgium, 11/24/42
Both to Blame Collision Clause
Our file No. S 20971

Gentleman:

In answer to your further inquiry the claim of the Esso BELGIUM against the NATHANIEL BACON for 1/3 of its payment to the cargo interests on the NATHANIEL BACON is not recoverable from the Hull Underwriters and therefore is a claim on the P & I Underwriters on the NATHANIEL BACON.

Should you be unsuccessful in recouping on behalf of the NATHANIEL BACON such loss from the cargo interests we will make reimbursement under the P & I policy less the deductible of $2,500.

Yours truly,

FULTON P & I UNDERWRITING AGENCY, INC.
(Signed) Paul R. Jansen
Vice President.

PRJ:bib

Copy to Burlingham, Veeder, Clark & Hupper
Attention of Mr. Ray Rood Allen

[EMBLEM]

Letterhead of

OFFICE OF THE SOLICITOR GENERAL
WASHINGTON, D. C.

February 26, 1952

ROSCOE H. HUPPER, ESQ.,
BURLINGHAM, VEEDER, CLARK & HUPPER,
27 William Street,
New York 5, New York.

Re: *United States* v. *Atlantic Mutual Ins. Co., et al.*,
U. S. Supreme Court, Oct. Term, 1951, No. 450.

Dear Mr. Hupper:

I have your letter of February 18, 1952 relating to the argument in the above-entitled case. I appreciate the position which you have urged. After full reconsideration of the matter, however, I continue to feel that the general policy of this office as described in my letter to you of February 11, 1952 should be adhered to in this case and that the United States should appear in the Supreme Court through Government counsel.

Mr. Morrisson of my office has arranged with Mr. Haller of your firm for mutual consultation with respect to the preparation of a reply brief.

Sincerely yours,

PHILIP B. PERLMAN

Philip B. Perlman,
Solicitor General.

[TELEGRAM]

RUSH

February 28, 1952
1:15 P.M.

HON. PHILIP B. PERLMAN,
Solicitor General,
Department of Justice,
Washington, D. C.

Referring your letter February 26 responding to my letter 18th concerning United States versus Atlantic Mutual etc. number 450 current Supreme Court Docket my belief remains as stated in my February 7 and 18 letters to effect that overwhelming comparative interest of the underwriters fairly requires in accordance their expressed desire that this case be argued by myself their behalf as their counsel which course wholly consistent with Government interest and protection thereof also consistent with co-operative provisions insurance policy. Endeavored reach you by telephone Wednesday afternoon for discussion soon after receiving your letter and up to one o'clock today am without response to this effort doubtless due your engagements other matters. Have not yet received printed copy Petitioners brief which names me among counsel but have borrowed copy of same from respondents counsel here. Presently believe further discussions between us unlikely produce results desired here therefore have decided with great respect your office and views to apply to Supreme Court by appropriate motion Monday next March 3rd with annex of correspondence for allowance appropriate time for argument by myself behalf underwriter clients with copy motion papers delivered your office in advance sincerely yours

ROSCOE H. HUPPER
27 William Street
New York City